

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/803,151 Confirmation No. : 5034
First Named Inventor : Ricardo M. ALVAREZ
Filed : March 18, 2004
TC/A.U. : 3727
Examiner : Robin A. Hylton

Docket No. : 100719.52887US
Customer No. : 23911

Title : Sanitary and Transpirable Packaging for Food Products

APPEAL BRIEF

Mail Stop Appeal Brief- Patents

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

This Appeal Brief is submitted in compliance with 37 C.F.R. § 41.37 along with the fee of \$250.00 set forth in 37 C.F.R. 41.20(b).

REAL PARTY IN INTEREST

Inoxmar 93, S.L., of La Rioja, Spain

RELATED APPEALS AND INTERFERENCES

None

STATUS OF CLAIMS

As filed, the Application contained a sole claim that was subsequently amended and finally rejected. That finally rejected claim is the claim on appeal (Claim Appendix).

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STATUS OF AMENDMENTS

No amendments have been filed subsequent to the final rejection mailed February 16, 2006, from which this appeal was timely taken on May 16, 2006.

SUMMARY OF THE CLAIMED SUBJECT MATTER

The claimed invention in the sole claim on appeal as directed to a package or container 1 having walls of laminate material such as paper and plastic as seen in Fig. 1 below before contents before have been introduced (Specification, page 3, lines 24-27).

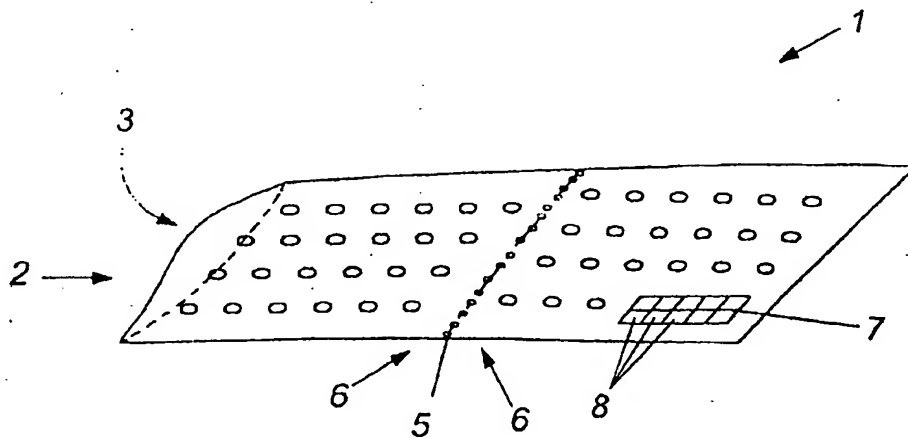


FIG. 1

An insertion opening 3 is provided for introducing food material or the like as the contents into the packaging and which is closed by heat-sealing so as to be non-reusable (Specification, page 1, line 33 to page 2, line 2; page 2, lines 28-30).

One or more weakening lines 5 are provided for allowing access to the packaging contents by tearing or the like (Specification, page 3, lines 3-4 and 31-33).

Holes 9 are arranged in the packaging to allow internal aeration to prevent the properties of the packaging contents to be adversely affected (Specification, page 3, lines 10-3; page 4, lines 4-5).

GROUND OF REJECTION TO BE REVIEWED

The sole ground of rejection presented for review is based upon the combination of the Raley et al. and Keller patents under 35 U.S.C. § 103(a).

Applicant submits that a prima-facie case of obviousness has not been made out. Therefore, reversal of the final rejection is in order.

ARGUMENT

Notwithstanding the recitation of insertion opening, a weakening line and holes in the original claim, the final rejection withdrew its original rejection of

that claim and applied the Raley et al. and Keller patents for the first time in said final rejection.¹

The final rejection characterizes the Raley et al. patent as teaching

a sanitary and breathable packaging comprising a container (22, 22') having walls of laminate material with at least one insertion opening with a non-reusable (heat-sealed) and holes selectively arranged for aeration internally into the packaging.

Although acknowledging that the Raley et al. patent "does not teach at least one weakening line for tearing into the packaging," the final rejection does not also point out what structure in the Raley et al. packaging material corresponds to the claimed insertion opening. Applicant submits that an insertion opening is not present in the Raley et al. packages exemplified by Figs. 4 and 10 as will be explained below.

Likewise, the final rejection does not point out the holes in Raley et al. that are arranged for aeration internally into the packaging. That is because there are no such holes as will also be explained below.

At the outset, it must be understood that the Raley et al. packaging is intended for an entirely different purpose than that of the claimed invention herein, and, for that matter, the Keller food pouch. That is, the Raley et al.

¹ Although the final rejection asserts that applicant's amendments to the claim "necessitated" the new ground of rejection, the record is bare of any reasoning in that regard.

packaging is designed for non-food items, particularly items that need to be and stay sterilized such as wound dressings. It does not appear that the perforated packaging material of Raley et al. is ever in a state which provides an insertion opening for producing the packages shown in Figs. 4 and 10. Rather, clamping and spot sealing at different locations on the film layers 11a, 11b is employed (col. 4, lines 22-26) or lamination is employed as seen in Fig. 3 (col. 4, lines 27-30).

Although it is clear that the film layers 11a, 11b in the Raley et al. packaging having perforations or holes 12 on the protuberances 12a, it is equally important to note that the holes on the layers are intentionally misaligned (col. 4, lines 20-21). This misalignment allows the non-food article inside the package to be sterilized but maintains that sterile condition because bacterial and other contaminants don't have a straight-line path to the interior of the package. If that is true, then the holes or perforations are not suitable arranged for aeration internally into the package as claimed in this application.

Indeed, the very different structure, assembling and end use of the Raley et al. packaging from that of the present invention also demonstrates why impermissible hindsight has been employed as the formal rejection in utilizing the foodstuff cooking pouch of Keller in which the holes are not, as alleged in the final rejection, provided for air movement but instead for allowing water to enter the pouch and circulate freely to cook the contents of the pouch (col. 2, lines 55-59). Absent impermissible hindsight, one of ordinary skill in the packaging art

seeking to improve the packaging disclosed in the Raley et al. patent would not have found any motivation or reason to look to the Keller patent.

The final rejection also does not address the issue of motivation to combine, an issue material to patentability. In re Lee, 277 F.3d 1338, 1343, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002). Reasoning and specificity are lacking in the final rejection. A prima facie case of obviousness has thus not been established.

Reversal of the final rejection is respectfully requested.

CONCLUSION

This Appeal Brief is accompanied by a check in the amount of \$250.00 payment of the required appeal fee. This amount is believed to be correct, however, the Commissioner is hereby authorized to charge any deficiency, or credit any overpayment, to Deposit Account No. 05-1323, Docket No.: 100719.52887US. A triplicate copy of this Appeal Brief is attached.

Respectfully submitted,

July 17, 2006



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CLAIM APPENDIX

1. Sanitary and breathable packaging for food products, comprising a container having walls of laminate material with at least an insertion opening with a non-reusable closure, at least one weakening line for tearing the packaging and extracting contents thereof, and holes selectively arranged around the packaging so as to be suitable in size and number for aeration internally into the packaging.



EVIDENCE APPENDIX

There is no such evidence as set forth in 37 C.F.R. § 41.37(c)(ix).